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FACULTY OF LAW

THEORY OF CONTRACT LAW
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VOLUME 3

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THEORY OF CONTRACT LAW

LAW226H1F, SUYRP, Fall 2009

Monday, 10:45am – 12:00pm

Tuesday, 10:45am-12:00pm

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SUMMARY

This seminar explores the role and basis of contract law both in its own terms as an exemplar of private law and also as a part of the larger legal and political order. The range of topics considered include particular doctrines or principles of the common law of contract (such as remedies, contract formation, unconscionability, mistake, public policy, etc), the relations between contract law and other parts of private law (for example, tort law), and the relation between contract and the larger legal/political order (such as its relation to distributive and social justice). A pervasive and underlying question will be: what might be the meaning and basis of contract law as an essential part of a liberal theory of justice? A range of different normative approaches will be considered, including rights-based, utilitarian, economic, distributive justice, Marxist, and critical accounts. While many if not most of the materials will be by contemporary writers, some materials will draw on older philosophical and theoretical accounts.

EVALUATION

A choice of one long paper (27-30 pages) (100%) or three short papers (7-8 pages) of equal weight (33%) on topics to be chosen from an assigned list and due at the end of the exam period.

READING LIST

I. Introduction

A. The Problem

- L.L. Fuller & William R. Perdue, Jr., "The Reliance Interest in Contract Damages: 1" (1936-1937) 46 Yale L.J. 52, pp. 52-66. 1
- P.S. Atiyah, "Contracts, Promises and the Law of Obligations" (1978) 94 Law Q. Rev. 193. 16
- Richard Craswell, "Against Fuller and Perdue" (2000) 67 U. Chicago L. Rev. 99. 32
- James Gordley, "A Perennial Misstep: From Cajetan to Fuller and Perdue to 'Efficient Breach'" (2001) 1 Issues in Legal Scholarship 1003. 95
- Daniel Friedmann, "The Performance Interest in Contract Damages" (1995) 111 Law Q. Rev. 628. 119

B. Alternatives

- Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge: Harvard University Press, 1981), pp. 1-27. 133
- P.S. Atiyah, Book Review of *Contract as Promise: A Theory of Contractual Obligation* by Charles Fried, (1981-1982) 95 Harv. L. Rev. 509. 147
- Anthony T. Kronman, "A New Champion for the Will Theory," Book Review of *Contract as Promise: A Theory of Contractual Obligation* by Charles Fried, (1981-1982) 91 Yale L.J. 404. 167
- Richard Craswell, "Contract Law, Default Rules, and the Philosophy of Promising" (1989-1990) 88 Mich. L. Rev. 489. 187
- Dori Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Oxford: Hart Publishing, 2005), pp. 57-87. 228
- Anthony T. Kronman, "Contract Law and Distributive Justice" (1979-1980) 89 Yale L.J. 472. 244
- Peter Benson, "Contract as a Transfer of Ownership" (2006-2007) 48 Wm. & Mary L. Rev. 1673. 284
- Richard Craswell, "Expectation Damages and Contract Theory Revisited," downloaded from SSRN (Aug. 2006 <http://ssrn.com/abstract=925980>). 343

II. Remedies

A. What is a Remedy?

- Guido Calabresi & A. Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," (1971-1972) 85 Harv. L. Rev. 1089. 398
- Ernest J. Weinrib, "Two Conceptions of Remedies" in Charles EF Rickett, ed., *Justifying Private Law Remedies* (Oxford: Hart Publishing, 2008) 3. 438
- Roy Kreitner, "Multiplicity in Contract Remedies" in Nili Cohen & Ewan McKendrick, eds., *Comparative Remedies for Breach of Contract* (Oxford: Hart Publishing, 2005) 19. 454
- Richard A. Posner, *Economic Analysis of Law*, 7th ed. (New York: Aspen Publishers, 2007), pp. 93-142. 470

B. Damages and Efficient Breach

- Richard A. Posner, "Let Us Never Blame a Contract Breaker" (2009) 107(8) Mich. L. Rev. 1349. 496
- Joseph M. Perillo, "Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference," (1999-2000) 68 Fordham L. Rev. 1085. 511
- Daniel Friedmann, "The Efficient Breach Fallacy" (1989) 18 J. Legal Stud. 1. 533

C. Damages, Specific Performance, and Compensation

- I.C.F. Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages*, 6th ed. (Pymont: LBC Information Services, 2001), pp. 51-77. 557
- Lionel Smith, "Understanding Specific Performance" in Nili Cohen & Ewan McKendrick, eds., *Comparative Remedies for Breach of Contract* (Oxford: Hart Publishing, 2005) 221. 571
- Daniel Friedmann, "Economic Aspects of Damages and Specific Performance Compared" in Djakhongir Saidov & Ralph Cunnington, eds., *Contract Damages: Domestic and International Perspectives* (Oxford: Hart Publishing, 2008) 65. 578
- Dori Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Oxford: Hart Publishing, 2005), pp. 89-115. 592
- Charlie Webb, "Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation" (2006) 26(1) Oxford Journal of Legal Studies 41. 606

Steven Shavell, “Is Breach of Contract Immoral?” (2006-2007) 56 Emory L.J. 439.	637
Seana Shiffrin, “ <i>Could</i> Breach of Contract be Immoral?” (2009) 107(8) Mich. L. Rev. 1551.	659

D. Punitive Damages

Caselaw

<i>Rookes v. Barnard</i> , [1964] 1 All ER 367 (H.L.).	677
<i>Fletcher v. Western National Life Insurance Co. et al.</i> , [1970] 10 Cal. App. (3d) 401.	681
<i>Vorvis v. Insurance Corp. of British Columbia</i> , [1989] 1 S.C.R. 1085.	686
<i>Whiten v. Pilot Insurance Co.</i> , [2002] 1 S.C.R. 595.	713
<i>Fidler v. Sun Life Assurance Co. of Canada</i> , 2006 SCC 30, [2006] 2 S.C.R. 3.	721
<i>Keays v. Honda Canada Inc.</i> , 2008 SCC 39, [2008] 2 S.C.R. 362.	737
Ernest J. Weinrib, “Punishment and Disgorgement as Contract Remedies” (2003) 78 Chicago-Kent L. Rev. 55.	769
Pey-Woan Lee, “Contract Damages, Corrective Justice and Punishment” (2007) 70(6) Mod. L. Rev. 887.	818
Pey-Woan Lee, “Inducing Breach of Contract, Conversion and Contract as Property” (forthcoming, 2009).	839
Daniel Friedmann, “Good Faith and Remedies for Breach of Contract” in Jack Beatson and Daniel Friedmann, eds., <i>Good Faith and Fault in Contract Law</i> (Oxford: Clarendon Press, 1995) 399.	858

III. Formation, Conditions, and Interpretation

A. Consideration

Charles Fried, <i>Contract as Promise: A Theory of Contractual Obligation</i> (Cambridge: Harvard University Press, 1981), pp. 28-39.	872
Lon L. Fuller, “Consideration and Form” (1941) 41 Colum. L. Rev. 799.	878
Peter Benson, “The Unity of Contract Law” in Peter Benson, ed., <i>The Theory of Contract Law: New Essays</i> (Cambridge: Cambridge University Press, 2001) 118, pp. 153-184.	904

Stephen A. Smith, <i>Contract Theory</i> (Oxford: Oxford University Press, 2004), pp. 215-244.	921
Barry Nicholas, <i>The French Law of Contract</i> , 2nd ed. (New York: Oxford University Press, 2005), pp. 118-128.	937
B. Unconscionability	
Charles Fried, <i>Contract as Promise: A Theory of Contractual Obligation</i> (Cambridge: Harvard University Press, 1981), pp. 92-111.	943
Richard A. Epstein, “Unconscionability: A Critical Reappraisal” (1975) 18 J.L. & Econ. 293.	953
James Gordley, “Equality in Exchange” (1981) 69 Cal. L. Rev. 1587.	976
Peter Benson, “The Unity of Contract Law” in Peter Benson, ed., <i>The Theory of Contract Law: New Essays</i> (Cambridge: Cambridge University Press, 2001) 118, pp. 184-201.	1046
C. Interpretation and Conditions	
Charles Fried, <i>Contract as Promise: A Theory of Contractual Obligation</i> (Cambridge: Harvard University Press, 1981), pp. 57-73.	1055
Michael J. Trebilcock, <i>The Limits of Freedom of Contract</i> (Cambridge: Harvard University Press, 1997), pp. 102-146.	1064
Catherine Valcke, “On Comparing French and English Contract Law: Insights from Social Contract Theory,” unpublished (2008).	1087
<u>IV. Contract Law and Distributive Justice</u>	
Anthony T. Kronman, “Contract Law and Distributive Justice” (1979-1980) 89 Yale L.J. 472.	1104
John Rawls, <i>Political Liberalism</i> (New York: Columbia University Press, 1996), pp. 257-288.	1144

